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RECENT NEW YORK LEGISLATION UPON WORKMEN'S COMPENSATION

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Up to within a week or so ago very few of us knew much about the constitutionality of workmen's compensation laws in the United States, or how far some admirable systems of caring for work accidents in use in Europe were open to us. Now, I am sorry to say, we know more, and it is not altogether to our liking.

The New York Court of Appeals has recently declared unconstitutional an act passed in New York, in 1910, on the recommendation of a legislative commission which had given some study to the question. There have been several suggestions for such laws in other states, but, speaking generally, this New York act was the first law in the United States which created a compulsory system of workmen's compensation. It applied to a very few dangerous industries, but gave to the workman injured through fault of the employer or by trade risks a choice of proceeding (1) under his previous existing legal rights—i. e., by a law suit with all the chances and defenses that entails, or (2) a right to be paid compensation of half wages, but not more than \$10 per week, during disability for not more than eight years, and in case of death three years' wages to go to dependents. Practically, the new right by the New York Act of 1910 was about like the right given under the English Workmen's Compensation Act of 1897, save that in New York there were many limitations more favorable to the employer, though the sums paid were higher. Under the New York act if the injured workman chose to sue at law he could not later get compensation and *vice versa*. If he chose to sue at law the employer had all the historic defenses, if he chose to claim compensation the employer was to have practically no defense save serious and wilful misconduct by the injured workman.

It is this act which is now held unconstitutional. The ground upon which the Court of Appeals puts its decision I understand to be substantially as follows: This act allows an injured workman

to recover for damage caused by the trade risks of certain dangerous employments and, therefore, under it, the workman can recover for an injury which the master could not have avoided in any way. Or, to phrase their reasoning differently, this act places liability upon the employer not only to pay the workman for all acts caused by the employer's negligence, but also to pay for injury to the workman who was unlucky enough to get hurt by the trade risk, which is nobody's fault. Such a statute, say the Court of Appeals, violates our fundamental law, in that it takes property without "due process of law," and so violates the state, as well as the federal, constitution,¹ since it places on the employer a liability to pay money when he has transgressed no legal rule of conduct.

When the New York Commission framed this law they realized the probability of this objection, and the decision of the Court of Appeals does not come as a surprise, although we hoped for less technical reasoning. It is a fair inference from the opinion of the Court of Appeals that though they believe the statute unconstitutional, they concede the evils of the present liability system and seem to think that the statute might well have been highly beneficial to society.

Nevertheless, I venture the opinion that their decision is most unfortunate. Even a defeated lawyer can, I think, say that with all propriety.

The decision is not one that should let loose any rant about "recall" of the judiciary and "thwarting the will of the people." It is true that the statute which a few reformers got through the legislature has been overthrown, but it is absurd to say that there is any general demand or outcry of the people of New York for workmen's compensation, even among workingmen, though organized labor officially approved this law and urged its passage. Outside of meetings like this, the question was never heard of by the New York public before 1910. The statute was passed as an experiment in government, a legitimate and proper experiment, as to the constitutionality of which there has always been a good deal of doubt. We must freely admit that the statute went counter to prejudices and traditions long current and long cherished in this country, particularly in the legal profession.

In another connection, Mr. Arthur Benson has said:

¹The phrase "due process of law" is identical in both.

One does not want life to be overwhelmed in a rush of fluid and hasty experiments. Toryism is not only the drag upon the wheel, it is the caution and prudence that annihilates hasty and sentimental theories. Justice is not done by trampling on prejudices and flouting traditions, but by recognizing the needs and the aims which they express. Little happy and solid work can be done under a sense of general insecurity, and in guarding against anarchy much genuine and fruitful eagerness must be sacrificed.

And so, in the fine phrase of Mr. Benson, our New York statute for workmen's compensation is the "genuine and fruitful eagerness" that has been sacrificed, and the decision must not one whit change our regard for the great bench of the New York Court of Appeals, if they are great tories, they are also great lawyers. For us who believe in replacing the American system of accident litigation by some system which shall insure prompt and efficient provision for those injured by industrial accident, the fundamental problems are still the same after that decision; the question is still, What system is wisest? How can we accomplish it? For any man who believes that the problem is a simple one, that it is a mere question of educating the masses to overwhelm the classes by the ballot, and insist on the right of the numerical majority—for that man I have no more sympathy than for the chronic tory who is a mere drag upon the wheel of progress. He is an equally unsafe adviser. Rather the problem is how to replace our accident system by another and a better, in such a way that the doing of it shall not too far awaken the fears and sense of insecurity which the tories feel in each change of the traditions of government or each new governmental interference in industrial matters and the relation of labor and capital.

How far, for instance, can we go under our present form of laws and constitutions, as interpreted by the Court of Appeals in New York, in reaching what we desire? Under that opinion, as I read it, there are practically no limits, save reasonableness, placed upon the power of a state to pass statutes which shall place upon employers the fullest obligation to take care to protect the lives of workmen—for instance, to fence machinery. Nor does that decision, as I read it, limit the power of the state to allow optional compensation plans for accident relief, i. e., to allow the employer and workmen to contract as to the methods of handling work accidents and their compensation.

There is much to be said for an optional system of caring for work accidents. It is consonant with the tory ideas of individual rights and theoretical freedom of contract and the whole political philosophy that, long dead, has been embalmed in our written constitutions. It is admirably suited to industries in which there is small risk of accident or in unorganized industries where the employers still stand in a patriarchal relation to their workmen. It is suited, again, to the richer and larger corporations of great strength who are able to offer their workmen exceptionally large rewards. It once seemed in a fair way to work well on the railroads. But it must be admitted that, with the present disposition of the labor unions, it gives little promise of successful working where the unions are strong, where the workmen are foreigners or very ignorant, and more important, it is particularly unsuited to smaller manufacturing concerns which cannot carry their own risks, but must cover them by insurance. Optional compensation then, while it may increase in efficiency, and wherever it applies is valuable, seems to give little promise of solving the whole problem; just because it is optional, and so long as it is so, is likely to be expensive. It is notable that in the only state (Massachusetts) in which a statute permitting it has been in force for any length of time, no one has taken advantage of it, and in New York, which has had a law permitting it since 1910, the workmen of only one concern have taken advantage of it. On the other hand, certain of the larger corporations, like the United States Steel Company and the International Harvester Company, have practically conquered their work accident litigation troubles by private optional plans which, in theory at least, entail no compulsion on the workmen, and under which the workmen retain all rights to sue at law.

The Court of Appeals decision leaves open another way of solving this problem, i. e., by increasing the penalties for negligence resting on the employer. That is, under the decision of the Court of Appeals any statute may be passed taking away the employer's defenses, for instance, making the employer responsible for all acts of the fellow servant, or doing away with the doctrine of contributory negligence. In other words, the Court of Appeals would sustain almost any liability act as long as it is based on fault of the employer. There can be no substantial doubt that such statutes would be constitutional. But it seems equally clear that such statutes would

be of little value. They still leave the problem of the accidents to the slow processes of jury trials with all the mystical and maddening legal rules of evidence, their unfortunate delays, and their lottery of high verdicts, they still leave the workman injured in employment by the risks of his trade without a remedy, and such laws leave work accidents dealt with by the law as if they were personal torts instead of social calamities. Such laws raise liability insurance rates by leaps and bounds and leave the final solution of our difficulty farther off than ever. In states like Pennsylvania, where the master's defenses are pure relics of the laws of the last century, some change may be advisable, if it be only to wake employers up and give the workmen some idea that the law sometimes turns in their favor, but no real relief is obtainable in that direction, and the decision of the Court of Appeals is most unfortunate in that it fairly invites such laws.

It has been suggested, originally in Wisconsin and Illinois, that the liability laws may be changed in favor of the workman, but made to apply only to those employers who do not offer compensation to their workmen. Such was the New York optional law of 1910. And in New Jersey there is a bill just passed which, in effect, takes away all the employer's legal defenses (fellow servant, assumption of risk and contributory negligence), but provides that it shall apply to those who consent to it, and then disingenuously provides that all employers and workmen who do not give notice in writing of their dissent shall be presumed to have assented to it. These schemes and their variations are known as persuasive methods of getting compensation. They go on the principle of making the liability laws so hard on employer and workmen if they do not agree to compensation that they will be obliged to take it.

As to the constitutionality of such plans there is a good deal of doubt. The New York Court of Appeals decision throws no light upon the question. I believe they are constitutional in every state, but my perspective on these legal questions may be blurred, and I conceive the tory point of view only imaginatively. The main difficulty with such schemes, I think, is rather that they are complicated, that they are expensive because they are always uncertain, and do not lend themselves at all to insurance. Persuasive schemes of compensation are really elective schemes. They have the same evil, i. e., that they are not compulsory, they have a new evil that

to the ordinary manufacturer who carries insurance they are unduly complicated and expensive, and where they do not work they have all the evils of our worst liability laws.

The Court of Appeals also leaves open one further loophole for change under our existing constitutions along the lines we wish to go. It is suggested in an opinion of Cullen and Bartlett, Justices, in this recent case, that while the New York act is unconstitutional, the legislature is bound by no constitutional restriction in revoking corporate charters, and that, therefore, the State of New York may to-morrow revoke practically every corporate charter in the state and give them back only to those corporations who accept this unconstitutional act. No reformer ever dealt so foul a blow at the tory shrine of vested rights, or forged more splendidly a weapon at corporate aggression. But that plan does not, I think, lend itself to our purpose. The object of this reform is not to humble or cramp corporate business. Such a remedy should be the last weapon against corporate greed or monopoly. If in truth, as the Court of Appeals say, the fundamental ideas of the law of negligence are intended to be embalmed in the constitution, we would not wish to impeach the corporations to take away their privileges.

So we are driven to the other and final recourse, the amendment of state constitutions. It is unwise to let the proletariat get too intimate with our state constitutions—speaking generally, the less we do to them the better. There is so much in them now that they are checks without being balances. True, the tory is aroused at once when we approach the constitution; this is the place where a fugitive before the march of change has been wont to claim sanctuary. What can be said to him? How can we pacify him? We can say to him truthfully, I think, that a compulsory system of workmen's compensation based solidly on a constitution will not mean more expense to industry than now exists in states like New York where there is a severe employers' liability law, that under such a system society will find the victims of accident promptly cared for, that one source of friction between employer and employed can be lessened, can be taken out of the list of class grievances, that under such a system liability insurance will become not what it is now, a hateful thing, but, like well-run life insurance, a beneficent thing. We must explain to our tory friend over again the new secret of corporate success, that the only course which is fatal to him is to

fight with public opinion and lose. By this faintly subtle argument we will lead up with our friend the tory to the moment when we lay before him a suggestion for amendment to our state constitution which, perchance, shall read thus:

The legislature may impose such reasonable conditions on any contracts of hiring or employment as shall be designed to guard or produce the health or safety or well-being of any of the parties thereto or the public, or to make provision for the payment to the employer or those dependent on him of the financial loss caused by accidents or disability in such employment.

And we will explain to our tory friend that this amendment will save for him his sanctuary, the courts, in their legitimate and wiser function; that is, as elder statesmen, who shall guard against the mob, anarchy, folly, hysteria and newspaper rule; and if all that is not true for him, it will be for his children if they, too, are tories.

In this plan, this scheme for conversion of the tory, I have not spoken of the Fourteenth Amendment to the Constitution of the United States, which insures to each of us that no state shall deprive us of life, liberty or property without due process of law. The intimation of the Court of Appeals of New York in the opinion of which I have been speaking is, that this clause would be violated by any state statute or constitutional amendment to a state constitution such as I have outlined. Their fundamental conception is that liability may not be imposed on A to pay B, save where A fails to observe some standard of duty set up by the law. With all respect, I cannot believe that principle so deep-rooted or fundamental in our system of government that it is not competent for a state, by its constitution, to declare that it will no longer treat an industrial accident as a tort, but will regard it as a social calamity resulting from the contract of hiring. When that question comes before the Supreme Court of the United States, if it arises as to the validity of a state constitution, the argument will, I believe, prevail that such an amendment is "due process of law," when, by experience, it is clear that the bulk of industrial accidents are the inevitable results of modern industrial methods, that they bear little relation to fault of workmen or employer, save as fault is common to all ordinary men, and that the old common law method of considering these accidents as torts or wrongs leads to endless and unsatisfactory litigation—when those facts are clear, the Supreme Court of the United States will, I believe, decide that it is due process of law

for a state to require, at least in those trades where danger of accident by the trade risk is great, that adequate provision be made for those injured in that industry. Whether that burden shall rest on the employer or upon both employer and workman is not at the moment important, the important point is that the state has the power to regulate conditions of relief from accident, exactly as well as to prevent accident. It is all a question of the wisdom of state regulation of the contract of employment, the relation of labor and capital, and I do not believe there is any restraint of such regulation under the Federal Constitution while it stops short of folly. If such regulation is not possible, then our government is indeed handicapped.

If I am wrong, there is no way to solve this problem of American work accidents immediately and simply, or in two decades. A compulsory system of work accident relief with or without contribution by workmen bids fair to solve the accident problem and the accident litigation problem as well. Any other method less simple must be worked out, with great difficulty, and great friction, political and social.